87-1805

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID S. KOMJATHY, **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April, 1988

QUESTIONS PRESENTED

1. When the Federal Aviation Administration (FAA) initiates a safety-rule violation case against a pilot it chooses between two disparate tracks of justice: an administrative system, and a judicial system.[1] With the first, it orders the suspension or revocation of his license as punishment for the violation. He or she may then ask the National Transportation Safety Board (NTSB) for a hearing, which is conducted by an administrative law judge, and his decision may be reviewed by the Board.

On the second track, if unable to effect compromise, it initiates a civil suit in district court, where either party has the right to "demand" a jury trial, and the penalty is a money fine.

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[1] As FAA enforcement is rather arcane, it is our opinion that brief background explanations are required for the questions presented. For a detailed explanation and legal history, see the law review article cited at p. 4 n. 4, infra.

Authority for certificate penalties is held to derive from § 609 of the Federal Aviation Act, as amended (FA Act), 49 U.S.C. § 1429(a), which is said to authorize FAA to suspend or revoke whenever it "determines that safety in air commerce . . . and the public interest requires . . ." It says nothing, however, of violations, offenses, rules, sanctions or penalties.

Authority for civil penalties derives from § 901, id. § 1471(a)(1), which provides that "Any person who violates . . . any rule, regulation, or order . . . shall be subject to a civil penalty . . ." Jury trial, from § 903, id. § 1473(b)(1).

Use of these two tracks means that the officials who initiate the case necessarily determine at the start: (1) the kind of trial the accused gets; (2) how he will be punished; (3) whether he can demand jury.

The questions presented are:

A. May Congress, having mandated right

to jury trial and money fines for safety violations, thereafter constitutionally authorize an FAA official to deny the accused those rights, and choose an administrative forum in lieu, which also brings with it a different, and generally conceded harsher form of punishment? Put another way, has Congress in fact ever authorized suspension or revocation as a penalty?

B. Assuming, arguendo, Congress so intended, is general language about air safety and public interest sufficiently specific constitutionally, and under the Administrative Procedure Act (APA), 5 U.S.C. § 558, to support a delegation of authority to impose certificate sanctions?

Alternate. The Circuit Court did not address the issue of whether language about air safety and public interest meets the APA's standards of clarity expressed in 5 U.S.C. § 558 which mandates that an agency may use a penalty only if explicitly auth-

orized by Congress. Thus the alternate question is whether the Court, should it not take jurisdiction, should remand with instructions to do so?

2. FAA has a single certificate action rule, Federal Aviation Regulation (FAR) § 13.19, 14 C.F.R. § 13.19. Like § 609, on which it is based, it speaks only of reinspection of aircraft and reexamination of airmen, qualifications matters, and says nothing of violations or sanctions, which are disciplinary matters. This rule has never been adopted through the APA public notice and comment procedures required by 5 U.S.C. § 553, which would require dismissal. The District of Columbia Circuit, even though it apparently holds it has been, goes on to hold it need not be, as it only paraphrases § 609.

The questions presented are:

A. Has FAR § 13.19 been lawfully adopted in accordance with § 553 public notice and

comment procedures? Or is it exempt?

B. Does an accused have a constitutional right to be told how he will be punished?

3. When prosecuting any safety violation case for which a penalty is sought, FAA officials utilize, or may resort to, three basic policies: (1) to initiate it, they must choose between certificate action or civil penalty; (2) they may use suspension or revocation as punishment in lieu of civil penalty;[2] (3) having started on one track, they may shift to the other--almost always certificate to money fine.

None of these has ever been published in the Federal Register,[3] or promulgated as a rule through public notice and comment.

The questions presented are:

A. Does the APA, 5 U.S.C. § 552(a)(1), require that these policies, as "rules of

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[2] These are dealt with in Question 4.

[3] Which means they also cannot be found in the Code of Federal Regulations.

procedure," "statements of general policy," or "interpretations of general applicability formulated and adopted by the agency," be published in the Federal Register; and for failure so to do require this case to be dismissed because that section provides that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ."?

B. Are these policies "substantive" within the meaning of the APA, § 553, and thus required to be promulgated by notice and comment, failure of which requires dismissal?

Alternate. Although raised, the Circuit Court did not address these issues, which assume, arguendo, authority to make the policies. The only issue is compliance with the APA. We submit this was a denial of justice. If favorable, either would have

been dispositive. Thus the alternate question is whether the Court, should it not take jurisdiction, should remand with instructions to do so?

4. FAR § 13.15, 14 C.F.R. § 13.15, is the civil penalty rule. It misrepresents the law, § 901, which reads: Any person who violates any rule "shall be" subject to a civil penalty. The rule reads: A person "is" subject to a civil penalty. Instead of 901's preemptory command, it reads as if FAA officials have the option not to use civil penalty. This is contrary to that section's plain meaning. It fails to tell the public that officials may shift from license penalty to money fine.

The rule has never been lawfully promulgated through APA notice and comment procedures; and was amended without their use.

The Circuit Court ruled that petitioner lacked standing to challenge this rule.

The questions presented are:

A. Does the rule violate due process and the APA by misrepresenting the law upon which it is based and failing to mention shifts in sanctions?

B. Was the rule and its amendment lawfully adopted pursuant to the APA, 5 U.S.C. §§ 552(a)(1), or § 553?

Alternate. Does petitioner lack standing? Should the Court decide that question, and if favorable, remand these issues to the Circuit Court? *

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* In preparing this petition we were mindful of Mr. Stern's admonition to keep it short. It is, however, near the maximum. In our view, any one of these questions, if decided favorably, would warrant reversal. The difficulty with reducing their number, however, is that on a practical level they are inextricably intertwined, and paint a total picture which we think the Court should see.

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DAVID S. KOMJATHY, **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner David S. Komjathy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding November 13, 1987, order denying rehearing entered February 1, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 832 F.2d 1294, and is reprinted in the accompanying separate appendix. (a-32)

The opinion and order of the National Transportation Safety Board (NTSB) has not been reported. It is reprinted in the appendix (a-19), as is the administrative law judge's oral initial decision, which it affirmed. (a-6)

JURISDICTION

The Federal Aviation Administration, on April 4, 1984, after having earlier served a Notice of Proposed Certificate Action on

May 23, 1983, initiated an enforcement action against petitioner, under 49 U.S.C. app. § 1429(a), by ordering a 180-day suspension of his private pilot license as punishment for certain alleged safety violations.(a-1) He appealed to the NTSB, under § 1429(a), and hearing was held by an administrative law judge on September 20, 1985, who upheld the suspension, with the final Board order, also affirming, entered July 14, 1986. Mr. Komjathy petitioned the Court of Appeals for the District of Columbia Circuit for review, under 49 U.S.C. § 1486. That court entered a judgment and opinion affirming the NTSB order on November 13, 1987; an order denying a petition for rehearing was entered February 1, 1988.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and regulations directly relevant to the issues are here listed, with the pertinent portions of their text set forth in the appendix:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706;

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1429(a), 1471(a)(1) & (2), 1473(a) & (b)(1);

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1986): §§ 13.15, 13.19; §§ 408.23 and 408.25 (1960).

STATEMENT OF THE CASE

The issues petitioner raises go to the Federal Aviation Administration's lack of authority to bring a safety violation case as a certificate action, its failure to comply with the Administrative Procedure Act, remedy for any failure of which is

dismissal, and related due process issues.[4] No issue turns on any fact involved in the incident. We briefly describe it, however, as a frame of reference. A number of salient facts of general public notice support the legal issues, which we present in the reasons section.

Mr. Komjathy, a maintenance supervisor for the New York State Thruway, and private pilot, on November 26, 1982, took off lawfully under visual flight rules (VFR) conditions from the Schenectady, New York, Airport. While still in its control zone (within five miles of the airport) a snow squall hit. Snow, unlike rain, cuts visibility to almost nil. He immediately radioed

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[4] For an indepth explanation and history of FAA safety enforcement, see Smith, **FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES; OR, HOW DO YOU PUNISH A PROPELLER?**, 14 Transp. L.J. 59-100 (1985) [hereinafter "Emperor"]; Smith, **FAA: Illegal disciplinarian?**, Aviation Digest at 26, Sep. 1987, and Smith, **FAA Blackjack**, Professional Pilot Magazine at 91, Feb. 1981.

tower for permission to return. Because the field was now under instrument flight rules (IFR), the tower told him to contact Albany approach control. They gave him certain directions which he either didn't hear or was unable to follow. A non-instrument rated pilot, he did the only sensible thing he could, dropped down low to keep contact with the ground, and flew back and forth across the airport until the controllers figured out they should let him land.

As a result, FAA charged him with flying in less than weather conditions required for VFR flight and contrary to air traffic control (ATC) instructions. Following appropriate notice, FAA, on April 4, 1984, ordered his license suspended for 180 days, strictly as punishment for violation of related air-traffic rules.

He asked the NTSB for a hearing. Counsel moved to dismiss, raising the same issues as here. The Board denied the motion, and

petitioner filed an interlocutory appeal with the District of Columbia Circuit, also denied, but on grounds no final order had been issued. Hearing was held September 20, 1985. On the advice of counsel, with petitioner's full knowledge and consent, he did not contest the charges. The administrative law judge (ALJ) upheld the suspension. Appeal was taken to the full Board, which affirmed.

REASONS FOR GRANTING THE WRIT

Exceptional Importance

One million American citizens, pilots, mechanics, flight engineers, air-taxi operators, repair stations and air carriers hold certificates issued by the Federal Aviation Administration. We estimate that at least 250,000 of them rely on their license for their livelihood. Tens of thousands of other jobs are dependent on companies with FAA operating certificates. In 1979, the last public statistics we are

aware of, 4,000 safety enforcement cases were closed by FAA. About 2,400, or 60%, the vast majority of them pilots, had their licenses suspended or revoked for periods of up to one year, strictly as punishment for the violation of safety regulations. Perhaps 700 relied on their licensees for their livelihood, not including businessmen who needed to fly for business travel. The other 40% were settled by civil penalty. Emperor at 60.

For private and student pilots, punitive certificate actions comprised 87% of the total. Ninety-nine percent of these were first offenses and generally involved inadvertent violations of traffic and other technical safety rules. Id. One can imagine what would happen if 87% of auto cases resulted in license suspension. Recently FAA officials have increased emphasis on certificate actions, even for professionals, rather than settle with a compromise money

fine, so today the figures could be considerably higher.

It is plain fact that no statute, no regulation exists which so much as hints that FAA may suspend or revoke a pilot's license as penalty for a safety violation. Put another way, this means that a lawyer unfamiliar with aviation, if asked to find out how pilots are punished for air-traffic violations, cannot find the answer in the United States Code or the Code of Federal Regulations (CFR). This is remarkable, to say the least.

What is also remarkable, and discernable through review of the Federal Register, is that FAA officials, in the agency's three decades of existence, have never, through APA notice and comment procedures, involved the public in the making of the few procedure rules they do have.[5]

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[5] Emperor at 82-98, traces this regulatory history.

In 1926, seminal year of federal regulation of aviation, Congress, for enforcement, considered both a criminal system and a civil penalty system with right to jury trial. It chose the latter. Neither then, nor at any time since has any agency ever asked for authority to set up a parallel certificate-sanction system of justice, no legislator has ever introduced a bill proposing such, no committee of Congress has ever held hearings on the subject.

The reported cases which provide the only foundation for the agency's claim of authority are all based on a gross error of fact: belief the certificate system was authorized by Congress in 1938, when in fact officials started it in 1926, right in the face of Congress' single choice, civil money penalties with jury trial.[6]

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[6] A detailed exposition of this, and how enforcement works, may be found in Emperor at 59-82.

I. FAA's claim that Congress authorized both a judicial and an administrative system of justice for the same violations, which allows it to deny right to jury trial, is without foundation.

A. Denial of right to jury trial. To raise as an issue whether Congress, having mandated right to jury trial and a money fine for air-safety violations, may thereafter constitutionally authorize a federal agency to deny those rights, at worst, must appear frivolous, at best, profoundly confused.[7] Such a situation would obviously violate the most fundamental precepts of our democracy and system of jurisprudence. Yet this is precisely what FAA's contention amounts to. It is spelled out by plain lan-

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[7] Although argued (Petitioner's Reply Brief at 18, Komjathy v. NTSB, United States Court of Appeals for the District of Columbia Circuit, No. 86-1444), perhaps this is why the circuit court failed to address this conundrum. Nor did the Ninth Circuit in Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986) (Petitioner's Reply Brief at 17, Go Leasing, Inc. v. NTSB, United States Court of Appeals for the Ninth Circuit, No. 85-7401).

guage in the agency's enforcement manual: "When violations occur, firm action must be taken. . . . Impose punitive sanctions, after the fact, to deter violations (e.g., certificate actions, civil penalties); . . ." Or this: "If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate action." Compliance and Enforcement Program, FAA Order 2150.3, ¶ 203.c.(1)(b) and ¶ 203.c.(2) at pages 13-14 [hereafter 1980 Handbook]. (See Exhibit A, a-72, which contains more examples.)

It is important to note that the manual carefully distinguishes qualifications matters from punitive purposes: "[Another purpose is to] [a]chieve remedial purposes (e.g., certificate suspension pending demonstration of qualifications; revocation for lack of certificate qualifications)."

Id. ¶ 203.c.(1)(c). (a-73).[8]

Authority for civil penalties and that claimed for certificate penalties provide a marked contrast:

> (a)(1) **Any person** who violates (A) any provision of subchapter III, IV, V, VI, or XII of this chapter . . . or **any** rule, regulation, or order issued thereunder . . . **shall be** subject to a civil penalty of not to exceed $1,000 for each such violation . . .
>
> (2) Any civil penalty may be compromised . . .
>
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>
> (b)(1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty . . . **either party may demand trial by jury** of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. . . .

Federal Aviation Act of 1958, as amended (FA Act), §§ 901 and 903, 49 U.S.C. app. §§ 1471(a)(1) and 1473(b)(1) [emphasis added]. What could be plainer? Certificate action:

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[8] See Emperor at 61-63.

> The [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. **If, as a result of** any such reinspection or reexamination, or **if, as a result of** any other investigation made by the [Administrator], **he determines that safety in air commerce or air transportation and the public interest requires**, the [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. . . . Any person whose certificate is affected by such an order . . . may appeal [for hearing] . . . to the National Transportation Safety Board . . .

FA Act § 609, id., § 1429(a) [emphasis added]. FAA contends, and several courts of appeal have so held (cases discussed, infra), that § 609 constitutes a broad grant of power to the Administrator to amend, modify, suspend or revoke a certificate whenever he "determines that safety in air commerce or air transportation and the public interest requires" it.

Several arguments undercut this claim:

(1) If one parses § 609 it is to be seen that the air-safety-public-interest language is lifted out of context. It is not a broad grant to use power but a condition subsequent to first reinspecting, reexamining or investigating ("if as a result of").[9] In actuality it offers the Administrator a way to justify a decision not to suspend or revoke.

(2) As we have seen, FAA carefully distinguishes between suspensions used for qualifications purposes and those used for punishment. If Congress intended to use § 609 as a parallel system of justice for violations, why would it use language relevant to qualifications, reinspection and reexamination, but fail to include such

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[9] "A general congressional exhortation to go forth and do good, without more, is not a proper foundation for the sound development of administrative law." Global Van Lines v. ICC, 714 F.2d 1290, 1295-96 (5th Cir. 1983); see also Emperor at 73.

obvious terms as violations, offenses, regulations, sanctions or penalties? The premier maxim of statutory interpretation, expressio unius est exclusio alterius, applies.

(3) Prior to Go Leasing, supra, and the instant case, in only three reported cases were certificate sanctions challenged: Wilson v. C.A.B., 244 F.2d 773 (D.C. Cir.), cert. denied, 355 U.S. 870 (1957); Hard v. C.A.B., 248 F.2d 761 (7th Cir.), cert. denied, 355 U.S. 960 (1957); Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962) [hereafter referred to individually or as the Triad]. All were airline captains. As they readily reflect, Wilson was the touchstone.[10] The challenge there was to the Civil Aeronautics Act of 1938, ch. 601,

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[10] Which makes it indeed puzzling as to why the District of Columbia Circuit in the instant case cited only Pangburn, 832 F.2d at 1296;. Pangburn clearly relies on Wilson. 311 F.2d at 354.

§ 609, 52 Stat. 973, 1011 (1938 Act). (That § 609 was pretty much the same as the present, except for the transfer of power from the Civil Aeronautics Board to the new Federal Aviation Agency in 1958.) The District of Columbia Circuit held, that "[b]y resting suspension on a Board determination that the 'interest of the public so requires,' Congress conferred broad discretionary authority upon the Board." 244 F.2d at 774; see also Emperor at 72. In a decision barely one-page, the court did not explain why § 901 was not exclusive. 244 F.2d at 774.

Lacking plain statutory language to support suspension penalties with administrative trial in lieu of right to jury, the Triad, especially Wilson, has always been the only such source for FAA's claim. The District of Columbia Circuit, however, adds a new one. It contends that NTSB is plainly authorized to review FAA suspensions--

citing statutes. 832 F.2d at 1297. That is undoubted, but it begs the salient question: For what purpose or purposes has Congress authorized FAA to suspend or revoke certificates? And would Congress knowingly authorize executive branch officials to deny right to jury trial?

The root problem with the Triad is that those cases are all based on a gross error of fact: this so-called "deterrent" sanction system of justice did not start in 1938, authorized by the 1938 Act, as the decisions show those courts believed, certificate penalties were instituted in 1926. See Emperor at 74-77 (which explains in detail how this happened).[11] Moreover,

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11 "[I]n October 1929, the [Aeronautics] Branch gradually began to deal more severely with violators. . . . [It] turned to suspensions as a primary enforcement tool. At the same time revocations were being handed out with greater frequency. . . ." **N. KOMONS, BONFIRES TO BEACONS, FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT 1926-1938**, at 107-08 (1978) (official history).

the government never argued that they started in 1938, but in their brief pointed out it was indeed 1926. See Emperor at 70 n. 75. But opposing counsel and the Wilson court failed to pick up on this and continued to focus on 1938.

The issue before these courts was congressional intent. How can the Triad cases have any validity when based on such a fundamental mistake? Any argument about that intent must be conducted in the time-frame of 1926. In fact, the government itself argued that it was the Air Commerce Act of 1926, § 3(f), 44 Stat. 568, 570 (1926), from whence came their authority. See

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The then extant certificate penalty rule read: "Pilots' and mechanics' licenses will be suspended or revoked for -- (A) Violating any provision of the air commerce act of 1926 or these regulations. . . . (F) Violating air traffic rules." Department of Commerce, Air Commerce Regulations, § 74 (A) and (F) (1926); see also 14 C.F.R. § 20.37110 (1938) (seminal edition of the C.F.R. in which this rule was codified for the first--and last--time).

Emperor at 75-76, and 74 n.91. But if conducted in that time-frame the government's position must fail. It is crystal clear that the only enforcement system chosen in 1926 was civil money penalties with right to jury trial.[12] **CIVIL AERONAUTICS, LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926**, at 59 (1928) (hereafter 1926 History); see Emperor at 67-68.[13]

Thus the real question is: On what basis would Congress, in 1926, for violations of air-safety rules, carefully choose a civil-money-penalty system of justice over a criminal system, mandate right to jury trial in district court, then at some point thereafter, authorize a parallel system of administrative justice with a certificate

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[12] See Air Commerce Act of 1926, ch. 344, § 11(b), 44 Stat. 568, 574.

[13] Is justice served when FAA, and appeals courts, continue to cite Wilson, Hard and Pangburn, without confronting the fact they are based on such obvious and fundamental error?

penalty, using only vague language about air safety and public interest, with no bill introduced or hearings held to support it? FAA never answers this question.

The irony of its position may be seen in this conundrum: Assume a gross safety violation by a pilot who either never had a license or had it revoked; without a certificate to act against, the only way FAA can prosecute him is by means of the civil penalty system. Thus the truly bad actor is assured of his right to jury and, at worst, a money fine collectible only by levy.

B. Even assuming, arguendo, that Congress intended to grant broad authority to use suspension and revocation for whatever is in the "public interest," it is an unconstitutional delegation of power.

Even if the above problems with § 609 could be overcome, its language about air safety and public interest is constitutionally inadequate as a touchstone of power. It is fundamental that Congress may not delegate its authority to create benefits

or sanctions. United States v. Eaton, 144 U.S. 677 (1892), United States v. Grimaud, 220 U.S. 506 (1910). This principle finds expression in the APA:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5 U.S.C. § 558(a) & (b). Its history:

> This provision, limiting administratively imposed requirements to the authority granted and delegated, is designed to afford statutory recognition for the basic rule of law, embodied in judicial decisions. The creation of penalties or benefits is exclusively the province of Congress.
>
> . . . .
>
> [It] means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted **no additional authority may be assumed. . . . Sanctions in the way of penalties or relief must be identified and authorized by law, and where authorized they must in any case apply in the factual situation presented.**

S. Rep. No. 248, 79th Cong., 2d Sess. 34 and 274 (1946) [emphasis added]. "No addi-

tional authority may be assumed" is another way of stating the maxim: Expressio unius est exclusio alterius. Congress chose civil money penalties with right to jury trial. Where does the FA Act say anything else? "Factual situation presented." The only factual situation § 609 talks about is "reinspection" and "reexamination," qualifications matters.

Assuming, arguendo, FAA has jurisdiction to impose punitive suspensions, specific authority presents a separate hurdle. At the least, this mandate imposes a standard of clarity for what sanctions Congress has authorized, and what it has not. What else could "must be identified" mean?

Congress wrote §§ 901 and 903 with a high degree of clarity. Where in the FA Act is there a hint that suspension or revocation may be imposed as a penalty?

The landmark FAA case of Pike v. C.A.B., 303 F.2d 353, (8th Cir. 1962), is instruc-

tive. A commercial pilot, Pike was charged with giving flight instruction when he did not possess an instructor's certificate. The court reversed revocation of his license because nothing in the statutes or FAA regulations specifically forbade him from giving instruction. Blackmun, J.:

> This lack of specificity and completeness of the Regulations disturbs us for this case. Because of this we are disinclined to reach a result, drastic in its application to the individual concerned (whether it be Pike or any other), which deprives an airman of admitted experience and ability his primary means of livelihood. [Citing cases] We prefer to have, where a result of that magnitude is to be forthcoming, a statute or regulation which is more positive and definite than those here involved.

Id. at 357. We doubt if the court meant that magnitude of the penalty would determine the legal principles, but a 180-day suspension of a private pilot who owns his own plane is hardly insubstantial.

It is axiomatic that a statute is unconstitutionally vague if persons of "common

intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). How can layman or lawyer read § 609 and obtain from it a legislative mandate for license penalties? "Vague laws offend several important values." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "There are, of course, instances where the plain language of a regulation [or statute] simply does not 'bear the construction' furnished by the officer or agency involved. Such a case was Pike v. CAB . . ." Gulf Oil Corporation v. Hickel, 435 F.2d 440, 445 (D.C. Cir. 1970).

Wilson held that "[b]y resting suspension on a Board determination that the 'interest of the public so requires,' Congress conferred broad discretionary authority on the Board." 244 F.2d at 744. By its own terms, even assuming, arguendo,

this were true, on its face it violates the standard of clarity required by § 558 and the principles laid down in Grimaud and Eaton, supra. It says, not that Congress delegated authority to impose suspension and revocation as punitive sanctions, but that the Board (then the C.A.B.) could suspend for whatever it deemed to be in the public interest. In other words, the choice was the agency's and, ergo, it, not Congress, created the sanction, which would make it an unconstitutional delegation.[14] Even NTSB recognizes the obvious, but not its legal relevancy:

> "This statute [§ 1429(a)] does not explicitly state that the Administrator may suspend a certificate for violations of the FAR;; however, a prior version of this section which contained similar

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[14] Wilson, of course, addressed none of this. Again, it is puzzling why the court below failed to do so; these issues were prominently raised. Petitioner's Brief at 36-40, Komjathy v. NTSB, supra, n. 7. Go Leasing, supra, held that § 558 had been complied with, but offered no analysis. 800 F.2d at 1526.

> langauge [sic] has been construed to authorize the suspension of an airman license for violations of safety regulations. 4/ In Wilson, the court rejected the argument that the then §609 which provided for the suspension of an airman certificate "if the interest of the public so requires" did not authorize a suspension for the violation of regulations.

Komjathy, NTSB Order No. EA-2343, SE-6249, July 14, 1986. (a-24-25)

II. FAA's certificate rule, FAR § 13.19 has never been lawfully adopted through APA public notice and comment procedures; it is unconstitutionally vague--does a citizen have a constitutional right to be told how he is to be punished?

A. Not lawfully adopted. FAR § 13.19, 14 C.F.R. § 13.19, is FAA's certificate suspension and revocation rule. The APA, 5 U.S.C. § 553, requires that "substantive" rules be adopted through formal public notice and comment procedures (Notice of Proposed Rule Making--NPRM). The rule is substantive and has not been so adopted. This requires dismissal. Id. § 706; Aiken v. Obledo, 442 F.Supp. 628, 650 (D.C. Calif. 1977) ("The reviewing court shall--

. . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . .").

The Circuit Court holds that the rule does not require formal adoption because it is not substantive as it merely paraphrases § 609 on which it is based. 832 F.2d at 1296-97. Evidently straddling both sides of the issue, the Court also appears to hold that, even so, rulemaking formalities were in fact complied with--and that petitioner agrees. Id. at 1297 n. 1. This is mistaken: petitioner does not in any manner agree.

Whether § 553 has been complied with is purely a factual question. Rulemaking requirements are well understood. First an NPRM in the Federal Register is required which includes: (1) time, place, and nature of the proceedings; (2) reference to the legal authority under which the rule is proposed; (3) its terms and substance. 5 U.S.C. § 553(b). In other words, the agency

explains that it is proposing a rule that will govern certificate actions and explains how it will work. After this notice, it collects comments sent in by interested persons to the docket number and address specified in the NPRM, considers and summarizes them, adopts a concise general statement of the rule and its purpose and, along with the rule as finally adopted, publishes this material in the Federal Register. Id. § 553(c)&(d).

The Circuit Court cites 27 Fed. Reg. 5694 (1962) as the required NPRM. 832 F.2d at 1297 n. 1. This notice cannot under any circumstances so qualify. It was part of a major rules recodification project carried out in 1961-62. Nothing in it refers to any proposal to create a certificate rule, much less explain its purpose, legal basis, or invites the public to comment on how it should work, etc. And in order to further comply one would have to cite to an addi-

tional Federal Register notice which contained a summary of the public comments, the rule as finally adopted, and so forth. Id. § 553(c)&(d). This was not done: no such notice was ever published.

The certificate rule at the time of this notice, 1962, was codified as 14 C.F.R. § 408.25, see 24 Fed. Reg. 10 (1959). Neither did this 1959 notice make any pretense of being an NPRM proposing a certificate rule (or any other--if it had, then the focus would be on 1959, not 1962); it simply announced that the new Federal Aviation Agency was adopting the entire set of enforcement rules it set forth. Nothing was said as to why § 553 requirements were not followed. See, Emperor at 87-90. The purpose of the recodification project was to change the old Part 408 numbers, and others, which were a carryover from the Civil Aeronautics Administration (CAA--metamorphosed into FAA).

The notice relied upon by the court below plainly states in its preamble:

> "Interested persons are invited to participate in the proposed recodification . . .
>
> The proposal is part of the program of the Federal Aviation Agency **to recodify its regulatory material** . . . The object of the new chapter is to restate existing regulations, **not to make new ones.** The pertinent provisions have been freely reworded and rearranged, **subject to every precaution against disturbing existing rights, privileges, duties or functions.** . . .
>
> . . . .
>
> **No substantive change has been made in the regulations,** the purpose of the recodification project being simply to streamline and clarify present regulatory language and to delete obsolete or redundant provisions. . . .

27 Fed. Reg. 5686 (1962) [emphasis added]. This notice referred to an earlier one, 26 Fed. Reg. 10698 (1961), which first announced the project. Id. It said:

> **This notice proposes no substantive changes in the regulations and is not a notice of proposed rule making subject to the Administrative Procedure Act.** . . . The program will not result in any new regulatory requirements.
>
> Most of the current rules and regulations have been inherited from predecessor organizations and were promulgated by them over a period of

more than twenty years. . . .

. . . .

The recodified system will serve to assure consistency in style, format and approach in any substantive revision of the actual requirements of the regulations that may be undertaken after the recodification program is completed. . . .

. . . .

With minor exceptions, the regulations included in the outline are those that were in effect January 1, 1961. . . . In addition, **rewritten regulations will be published under notices of proposed rule making** in the FEDERAL REGISTER and all interested persons will be invited to submit comments and recommendations on the form and manner of their inclusion in the recodified structure.

Id. 10698-99 [emphasis added]. It should be noted that this notice proposed to codify enforcement rules as Part 15. Yet another notice, apparently the last, changed Part 15 to the present Part 13. It stated:

A part of the comments received recommended specific substantive changes to the regulations. Although some of these recommendations might, upon further study, appear to be meritorious, **they cannot be adopted** as a part of the recodification program. The purpose of the program is simply to streamline and clarify present regulatory language and to delete obsolete or redundant provisions. **To attempt substantive changes in**

> **the recodification of these regulations** (other than minor, relaxatory ones that are completely noncontroversial) would delay the project and **would be contrary to the ground rules specified for it in the FEDERAL REGISTER** on November 15, 1961 (26 F.R. 10698), and Draft Release 62-27. However, all comments of this nature will be preserved and considered in any later substantive revision of the affected parts.

27 Fed. Reg. 9585 (1962) [emphasis added].

Under no circumstances has FAR 13.19 ever been promulgated through public notice and comment procedures. How the District of Columbia Circuit concluded otherwise is difficult to understand. All of these Federal Register notices, along with appropriate quotations, were cited to it for reference. (Petitioner's Reply Brief at 10-11, Komjathy v. NTSB, supra.)

Is 13.19 is exempt from rulemaking? The Circuit Court asserts that the rule "does no more than repeat, virtually verbatim, the statutory grant of authority in 49 App. U.S.C. app. § 1429(a) [§ 609] for the ordering of such suspensions." 832 F.2d at

1296. This manifestly is not correct. It delegates to specific agency officials the Administrator's authority to issue suspension and revocation orders. These officials are not designated by § 609. The need to formally delegate is required by FA Act, § 301, 49 U.S.C. 1341(a) ("The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof."), and § 302, id. § 1343(f) ("The [Administrator] is authorized . . . to define their authority and duties . . .").

Since Congress has delegated to the Administrator enormous responsibility to make rules (laws) on its behalf and issue orders that often determine the right to hold a job, or continue in business, surely it is a matter of substantive public concern to whom he delegates this authority. A clerk?

Implementing § 609, the rule lays out a scheme of procedural due process. The statute instructs the Administrator "except in cases of emergency, [to] provide the holder of such certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended or revoked." 49 U.S.C. app. § 1429(a). It does not specify how the charges are to be presented, how process is to be served, how the accused shall answer.

The rule offers a number of options for the accused. By what means does the agency serve the notice of proposed certificate action? It doesn't say. Service of process is one of the most fundamental of procedural due process concerns. Is it to be personal service? Certified mail? What happens if the accused is out of the country and someone else signs for it? The holder only has 15 days to respond. Do not "interested persons" of the aviation public

have the right to comment on whether it should be 10 days, 20 days, 30 days? The informal conference, or option to write a letter, is FAA's interpretation of 609's command to provide an opportunity to answer. This is the agency performing a legislative function, filling in details.

What the rule does not say is as significant as what it does. The accused has an automatic stay of any order, unless "the [Administrator] advises the . . . Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order . . ." When an FAA official declares an emergency pilots are instantly put out of their job, businesses closed down with dozens or hundreds of employees out of work. Yet 13.19 does not specify how that advice is to be given, or in what period of time.[15]

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[15] This lack of detail allows an FAA official to extend the 60-day limit in

Where are criteria establishing what constitutes a threat to air safety?[16] Should the official have to file an affidavit, or otherwise explain his drastic action? Now, all he does is recite the litany that the order is in the interest of air safety and the public, without having to say why.

The Circuit Court's holding that 13.19 does no more than paraphrase § 609 does not

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which the Board must decide the case, by first serving the order on the holder to shut him down, which he always obeys on the spot, then delaying his letter of advice, which is a separate document. Under NTSB rules the 60 days only start running "as of the date when the Administrator's written advice of the emergency character of his order has been received . . ." 49 C.F.R. § 821.54(b). This same issue is raised in Mallen v. Federal Deposit Insurance Corporation, 667 F.Supp. 652 (D.Ia. 1987), Sup. Ct. No. 87-82, July 9, 1987.

[16] Although FAA has no emergency rule as such, CAA, its predecessor, did: "[An emergency will be deemed to exist [i]n the event the condition or conduct of a certificate holder is such as to indicate immediate danger of injury to a person or damage to property, and the immediate suspension of the certificate might reasonably be expected to avert such injury or damage . . ." 14 C.F.R. § 408.25 (1952).

comport with the facts. The rule, indeed, does do that, but it also affects individual rights and obligations by legislating a substantive scheme of procedural due process, the test set out in Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979). "Once an agency rule or regulation has been determined to be substantive, it nevertheless will not have 'the force and effect of law' unless its promulgation conforms 'with any procedural requirements imposed by Congress.' [Citing Chrysler Corp., id. at 303.]" Cubanski v. Heckler, 781 F.2d 1421, 1425-26 (9th Cir. 1986). The rule has never been lawfully promulgated. The requirements of the APA were designed to assure fairness and mature consideration of rules of general application. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); see also Pharmaceutical Mfrs. Assoc. v. Finch, 307 F.Supp. 858 D. Del. 1970).

B. Right to know the penalty. FAR §

13.19 violates due process. Petitioner (and the public) has a right to be told how FAA will punish him for a safety violation. FAA interprets § 609 to authorize suspension and revocation for two entirely separate purposes: (1) suspension until the holder demonstrates he is qualified, revocation if it turns out he is not; (2) purely as punishment for the violation of a safety rule. 1980 Handbook, ¶ 203.c.(1)(b)&(c) and ¶ 205.b.(3)&(4) at pages 13 and 15. (a-72-73) Yet the rule warns only of its use for qualifications matters (reinspection and reexamination). Failure to tell the public about punitive suspensions violates the APA and the most basic concepts of substantive due process. Pike v. C.A.B., supra.

Whether § 609, through vague language about public interest, authorizes suspension penalties is an entirely separate issue from whether the agency (which, after all, has complete control over what it

publishes as regulations) has lived up to its responsibilities in telling the public what its enforcement policies are. "Vague laws offend several important values." Grayned v. City of Rockford, supra, 408 U.S. at 108. Why would this important regulatory agency not tell the persons it regulates their licenses are at risk for safety violations?

The Circuit Court appears to say that the rule is adequate as long as it repeats § 609's public interest language, and that the public ought to be able to figure out that this includes suspension and revocation as penalties. 832 F.2d at 1296. This is a remarkable position. The reasoning behind it is rather unclear. What is clear, is that nothing can change the fact that there is neither statute nor regulation which so much as hints that in addition to the civil-money fine suspension and revocation are also used as penalties.

III. Three basic policies apply to any FAA safety enforcement case: (1) right to choose the track of justice, administrative or judicial; (2) right to impose a certificate penalty; (3) right to shift from one track to the other. Not one has ever been published in the Federal Register or, although substantive, promulgated through public notice and comment procedures.

A. Failure to publish. FAA policies: (1) direct agency officials, when initiating any safety violation case, to choose between the § 609 administrative track of justice and the § 901 civil-penalty-jury-trial track; (2) explain that certificate suspension or revocation, may be used as punishment in lieu of civil penalties; (3) authorize officials, in their discretion, having initiated one track, to shift over to the other (almost always certificate to civil money fine).

All three may be found in the agency's enforcement manual. (1) "Formal legal actions are undertaken to: . . . Impose punitive sanctions, after the act, to deter violations (e.g., certificate action, civil

penalties) . . ." 1980 Handbook, supra, ¶ 203.c.(1)(b) (a-73); (2) "If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate." Id. ¶ 203.c.(2) (a-74); see also ¶ 205.a. & b. (a-75-78) Policy No. 3 reads:

> Shift in sanctions Ordinarily it will not be FAA policy to withdraw one remedy, after it has been commenced, to pursue another, although circumstances may arise in which such action is appropriate. An example where such action would be appropriate is when counsel has commenced certificate action against a pilot and thereafter learns that the pilot uses an aircraft in business or a profession and that the proposed suspension would constitute a sanction much more severe than is warranted by the violation. Contrary situations will also occur.

Id. ¶ 1202.a.(4) at page 163.[17]

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[17] The manual does not explain what happens to the pilot's right to jury trial. Had agency officials initiated the case as a civil penalty instead, the accused would have been in a position to say, "I didn't do it, I won't pay, sue me," and then would have been able to "demand" a jury trial. Nor does it, of course, explain how, once having started the case as a civil penalty, with its absolute right to jury trial, the

Congress has mandated in the APA that virtually every agency policy which might somehow impinge on the public be published in the Federal Register or promulgated through formal procedures. Senator Pat McCarran, its sponsor, called that act

> a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government. It is designed to provide guaranties of due process in administrative procedures.

S. Rep. No. 248, 79th Cong., 2d Sess. 298 (1946). The act provides that each agency shall "publish in the Federal Register for the guidance of the public-- . . . [inter alia] rules of procedure, statements of general policy, or interpretations of general applicability formulated and adopted by the agency . . ." 5 U.S.C. § 552(a)-(1). Unless the person has actual and time-

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FAA can deny that right and switch to a certificate action -- "contrary situation". **Is it not incumbent upon FAA to explain this conundrum?**

ly notice, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ." Id. This is a legislative exclusionary rule, the only remedy should an agency violate the act.

The three policies fit one or more of the named categories, arguably all three. FAA has never contended otherwise. Since no reference to any one of them is to be found in the FA Act, they are clearly interpretations of §§ 609 and 901, formulated and adopted by the agency and, obviously, of general applicability. FAA has never claimed that any one of them has ever been published in the Federal Register. Never claimed they do not apply, or would not be available to resort to, in petitioner's case.[18] Since they do apply, fall within

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[18] FAA's defense seems to be that since they are contained in the enforcement

one or more of the named categories, and have never been published, the federal courts must follow Congress' mandate and dismiss.

The only place official reference to these FAA policies may be found is in agency manuals. The Court has specifically held this not to be sufficient: APA publication requirements must be followed. Morton v. Ruiz, 415 U.S. 199 (1974). "The statute [5 U.S.C. § 552(a)(1)] clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby." Northern California Power Agency v. Morton, 396 F.Supp. 1187, 1191 (D.D.C. 1975), affirmed 539 F.2d 243 (D.C. Cir. 1976). "Any agency regulation that so directly affects preexisting legal rights or

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manual and it is available to the public they need not be published. This argument is wholly without merit.

obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement [of the APA]." Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977).

B. Failure to promulgate. Each of the three policies constitutes a "rule" as defined by the APA: "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . 5 U.S.C. § 551(4). The basic question, however, is whether or not these "rules" are "substantive" within the meaning of id. § 553(d) ("The required publication of a substantive rule shall be made . . .") and § 552(a)-

(1)(D) ("substantive rules of general applicability adopted as authorized by law"). If so classified, the APA mandates that they be adopted pursuant to formal procedures which require, inter alia, notice of proposed rulemaking published in the Federal Register with a statement of basis and purpose, opportunity for public comment, and publication of the rule as finally adopted. Id. § 553(b).

The policies are clearly substantive, they affect a property right. See Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984). Careful search of the Code of Federal Regulations and Federal Register since 1958 reveals no NPRMs or rules as finally adopted for any of the three. That failure is an absolute bar to this case: "[A] person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5

U.S.C. § 552(a)(1). "The reviewing court shall--hold unlawful and set aside agency action . . . found to be-- . . . not in accordance with law." Id. § 706(2)(A); Aiken v. Obledo, supra, 442 F.Supp. at 650. "The purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." Am. Standard, Inc. v. U.S., 602 F.2d 256, 269 (U.S.Ct. of Claims 1979).

Section 553(b), was meant to provide an opportunity for public participation in the rule making process when that process results in the promulgation of rules or regulations of substantial impact. Pharmaceutical Mfrs. Assoc. v. Finch, 307 F.Supp. 858 (D. Del. 1970); Phillips Petroleum Co. v. Dep't of Energy, 449 F.Supp. 760 (D. Del.), affirmed 596 F.2d 1029 (Emer.Ct.App. 1978); National Retired Teachers Ass'n v.

United States Postal Service, 430 F.Supp. 141 (D.D.C.), affirmed 593 F.2d 1360 (D.C. Cir. 1979); see also NLRB v. Wyman-Gordon Co., supra, and Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3rd Cir. 1969). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983).

Alternate question. These issues of publication and promulgation were prominently raised in petitioner's brief below. FAA has never contested the existence of these policies, that they fit the § 552(a)(1) categories, or claimed they do not apply to petitioner's case. They have not, because it is impossible to suggest otherwise. Yet the District of Columbia Circuit failed to address both issues, which would have been dispositive of the case--and which,

assume, arguendo, full authority to make the policies.

We submit that this failure was a denial of justice, and ask the Court, should it not take jurisdiction of this case, to remand it to the Circuit Court with instructions to decide the two issues.

IV. FAR § 13.15, the civil penalty rule, violates due process: it was purposefully amended to misrepresent the law; it fails to advise the citizen that it may be resorted to as an alternative to certificate action; neither original rule nor amendment were promulgated in accordance with APA procedures. The APA's "resort to" language provides petitioner with standing.

A. FAR § 13.15 misrepresents the law.

The statutory basis for FAA's civil penalty rule, FAR § 13.15, is § 901, which reads:

> **Any person** who violates . . . **any** provision . . . [of this Act], or **any** rule, regulation or order issued thereunder . . . **shall be** subject to a civil penalty of not to exceed $1,000 for each such violation. . . .[19]

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[19] The statute was recently amended to raise the civil penalty for air carriers to $10,000; but the $1,000 limit was left untouched for individuals. P.L. 100-223, Sec. 204, 101 Stat. 1519 (1987).

49 U.S.C. app. § 1471(a)(1) [emphasis added]. The rule reads:

> (a) Under sec. 901 of the Federal Aviation Act of 1958 . . . **a person** who violates any provision . . . of that Act, or any regulation or order issued [thereunder] . . . **is subject** to a civil penalty . . .

14 C.F.R. § 13.15(a) [emphasis added].

The plain command of section 901, "Any person shall be subject to a civil penalty," cannot be reconciled with "a person is subject to a civil penalty." The rule misrepresents the law in a fundamental way. It changes a peremptory command that FAA officials use civil penalty for all violations, to "use it if you feel like it."

The rule uses the phrase "if a civil penalty is contemplated." Id. § 13.15(b). Thus it is deficient because it does not explain, if not a civil penalty, just what it is that is contemplated for the violation. We know, of course, it is certificate action. Nor does it mention that the

penalty can be shifted from suspension or revocation to a money fine.

In light of the lengths to which the agency goes in its enforcement manual to guide its officials on how to choose between the two forms of action, is it not remarkable that neither 13.19 nor 13.15 mentions the other?

By writing a regulation that misrepresents the law, fails to advise that the agency claims it can choose between civil and certificate penalties (as well as two disparate forms of justice) and that its officials may shift back and forth between them, FAA violated the APA and petitioner's right to due process under the Fifth Amendment. Pike v. C.A.B., supra, Gulf Oil Corporation v. Hickel, supra; see also Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

B. Both original and amended rule promulgated in violation of APA. FAR ¶

13.15 started life as 14 C.F.R. § 408.23 (1960), first published in 24 Fed. Reg. 10 (1959). It has never been promulgated through the APA public notice and comment procedures required by 5 U.S.C. § 553. It tracks FAR § 13.19 in this regard (since it was always the entire set of rules published, not single ones). FAA does not dispute this. Like 13.19, this rule is substantive because it delegates authority and legislates procedures for FAA handling of civil penalty cases, that is, creates a system not spelled out in the statute. We adopt by reference 13.19's arguments, supra.

FAR § 13.15, however, has an added dimension, however. It was once amended--on the sly, it's fair to say--completely changing its meaning, without following either the publication or notice and comment procedures of the APA. As § 408.23, and when first announced, the rule faithfully followed § 901: "Under section 901 of

the Act, any person who violates any provision . . . of the Act, or any rule, regulation, or order issued thereunder, shall be subject to a civil penalty . . ." 24 Fed. Reg. 10 (1959), 14 C.F.R. § 408.23 (1960) (a-66). The recodification project first proposed that enforcement rules be codified as Part 15. See 27 Fed. Reg. 5694 (Thursday, June 14, 1962). It was in this particular notice where the language was changed to read "a person is subject to a civil penalty." Then in yet another publication of the rules, as finally recodified, Part 15 was changed to Part 13, where it still remains. 27 Fed. Reg. 9586, 9590 (1962) (Friday, September 28, 1962). (It seems strange FAA officials had such a hard time settling on the new number.)

Nothing in the notice of June 14, 1962, explained it was changing the language of the civil penalty rule, publishing a new or amended rule of procedure, statement of

general policy, or interpretation of general applicability formulated and adopted by the agency. This violated the publication requirements of 5 U.S.C. § 552 (a)(1). As the change was obviously substantive, from peremptory command, to at your discretion, the failure to use notice and comment procedures violated id. § 553. Both failures require dismissal. Id. § 706.

C. Lack of standing. The Circuit Court holds that petitioner lacks standing to challenge the civil penalty rule. This position reflects a serious lack of understanding of FAA enforcement. It cites Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). It is difficult to understand the relevance of a case where those who lacked standing were an independent group dedicated to challenging government action they believed violative of separation of church and state. More relevant

is United States v. SCRAP, 412 U.S. 669 (1973). If a group of law students concerned about forests being trashed because of a freight-rate increase have standing, where does that leave petitioner whose license is subject to an integrated FAA enforcement program that includes both civil and license penalties?

The Valley Forge test cited is that petitioner may invoke the court's authority only if he "has suffered injury, whether past or future, that the injury is traceable to the action of the defending party, and that a favorable ruling by the court is likely to remedy the harm." 832 F.2d at 1295-96. Petitioner fully meets this test. As the manual makes clear, before initiating the case against him, FAA officials were required to choose between certificate action and civil penalty. The injury is obvious: by choosing to suspend his license, petitioner was denied the right to

have his trial in district court where, should he have so desired, he could have "demanded" a jury; he was denied the opportunity to negotiate a compromise and, failing that, if convicted, a money fine was the worst he'd have suffered.

The District of Columbia Circuit also overlooked the shift in sanctions policy, which puts the issue squarely within the APA. As we have shown, this is an integral part of enforcement policy; 99.99 % of shifts are from certificate action to money fine. The only survey to our knowledge ever done showed that 35% of all civil penalties started as certificate actions. See Emperor at 79 n. 115. The Circuit Court is clearly saying, if the agency chooses not to use civil penalty in your case, you can't complain. The irony of this is that it leaves one's standing completely in control of the agency itself.

How could petitioner "be required to re-

sort to," 5 U.S.C. § 552(a)(1), the shift in sanctions policy when it had never been published in the Federal Register?[20] See W.G. Cosby Transfer & Storage Corporation v. Froehlke, 480 F.2d 498, 503 (4th Cir. 1973) ("Before debarring a contractor from future government contracts, a federal agency must comply with § 3(a) of the [APA] by stating and publishing its rules of procedure. [Citing cases]"). Petitioner has standing.

Should the Court decline to take jurisdiction of this case, we respectfully ask it to at the least consider this standing issue, and if favorable to petitioner, remand to the District of Columbia Circuit with instructions to decide the civil penalty issues.

---

[20] And how would he know? This writer has interviewed dozens of airmen; it is certain the vast majority, and most of their lawyers, do not know of this shift policy. How would they, with no rule?

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Should the Court not take jurisdiction, petitioner asks it to take cognizance of the standing issue and the fact the District of Columbia Circuit failed to address the several legitimate issues noted, any one of which would have been dispositive of the case, and in exercise of its supervisory powers to remand to that court for their disposition.

Respectfully submitted,

LAWRENCE B. SMITH
3938 E. Grant Rd., #191
Tucson AZ 85712
602/326-0283
Counsel for Petitioner

April 1988

87-1805

Supreme Court, U.S.
FILED
APR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID S. KOMJATHY, **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO ACCOMPANY THE PETITION

Lawrence B. Smith
3938 E. Grant Rd., #191
Tucson, Arizona 85712
(602) 326-0283
Counsel for Petitioner

April, 1988

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* * * * *

U.S. Department of Transportation
Federal Aviation Administration
Eastern Region

April 4, 1984

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. David S. Komjathy
2522 Heiderberg Trail
Berne, New York 12023

Docket No. 83EA010001

ORDER OF SUSPENSION

On May 23, 1983, you were advised by mail through a Notice of Proposed Certificate Action of the reasons why we proposed to suspend your Airman Certificate.

After a consideration of all the evidence presently a part of this proceeding, it has been determined that you violated the Federal Aviation Regulations hereinafter specified by reason of the following:

1. You are now, and at all times mentioned herein were, the holder of Airman Certificate No. 71322174, with a private pilot rating.

2. On or about November 26, 1983, at approximately 17:54 Z you were the pilot-in-command of a Cessna 150 aircraft, identification number N8526J, departing Schenectady Airport, Schenectady, New York under visual flight rules (VFR).

3. Shortly after take-off, you decided to return to Schenectady and contacted Schenectady Tower to request landing instructions. Due to adverse weather conditions you were advised to contact Albany Approach Control for a special VFR clearance.

4. At approximately 18:05 Z you contacted Albany Approach and were directed to depart the Schenectady Control Zone to the Northeast. You acknowledged that instruction.

5. At approximately 18:09 Z you were observed flying over runway 4 at Schenectady Airport. You did not

contact the Schenectady Tower at that time.

By reason of the foregoing, you violated the following Sections of the Federal Aviation Regulations:

1. Section 91.75(b), in that you operated N8526J contrary to an air traffic control instruction issued by Albany Approach Control to depart the Schenectady Control Zone.

_____ p.1 _____

2. Section 91.105(d), in that you entered the traffic pattern and landed your aircraft at Schenectady Airport, which is within the Schenectady Control Zone, under VFR, with a reported ground visibility at the airport of less than three statute miles.

3. Section 91.87(c), in that you operated N8526J within the Schenectady Airport traffic area without establishing or maintaining two-way radio

communications between the aircraft and the Schenectady Tower.

4. Section 91.9, in that by disobeying the instructions of the Albany Approach Control you operated your aircraft in a careless or reckless manner so as to endanger the life or property of another.

By reason of your violations of the Federal Aviation Regulations, the Administrator has determined that safety in air commerce and the public interest require the suspension of your Airman Certificate, with a private pilot rating.

NOW, THEREFORE, IT IS ORDERED, pursuant to Section 609 of the Federal Aviation Act of 1958, as amended, that your Airman Certificate No. 71322174, with a private pilot rating be suspended as of April 24, 1984, and that said certificate be surrendered to the undersigned Regional Counsel, said suspension shall commence on April 24,

1984, and continue in force until 180 days subsequent to the actual surrender.

THOMAS C. HALLORAN
Regional Counsel, AEA-7

By /s/ Diane R. Recio
Diane R. Recio
Attorney

APPEAL

You may appeal from this Order within twenty (20) days from the time of its service upon you to the National Transportation Safety Board, Rm. #822, 800 Independence Avenue, S.W., Washington, D.C. 20594. A copy of your Notice of Appeal must be furnished this office. Such appeal will stay the effectiveness of this Order.

_____ p.2 _____

ORAL DECISION

JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958 as amended, and in conjunction with the Board's Rules of Practice and Air Safety Proceedings, on the appeal of David S. Komjathy from an Order of Suspension dated April 4th 1984 which purports to suspend Respondent Komjathy's Private Pilot Certificate No. 71322174, which is a Private Pilot Certificate, the Order of Suspension, as is provided in the National Transportation Safety Board's Rules of Practice, serves herein as the Complaint and was filed on behalf of the Administrator of the Federal Aviation Administration, herein the Complainant, through his Regional Counsel, Eastern Region of the Federal Aviation Administration.

This matter has been heard before this Administrative Law Judge, and as is provided by the Board's Rules of Practice, specifically Section 821.42 of those rules, as a Judge in this proceeding I have elected to issue an oral decision in this matter.

Following Notice to the parties, this matter came on for trial in Albany, New York on September 20th 1985. The Respondent was present at all times, and the record should show that while he is represented by counsel, Mr. Lawrence Smith, Mr. Smith was not present here today in the Courtroom,

_____ p.97 _____

although the Respondent, Mr. Komjathy, was. As I said, the Respondent was present at all times and elected to proceed.

The Complainant, the Federal Aviation Administrator, was represented by one of his staff counsel, Mardi R. Thompson,

Esquire of the General Counsel's Office, Federal Aviation Administration.

The parties have been afforded full opportunity to offer evidence, to call and examine, to cross examine witnesses. In addition, the parties were afforded the opportunity to make argument in support of their respective positions if they so desired, and let the record indicate that both parties did waive the right to make a final argument.

It should be indicated for the record that counsel of record for the Respondent in this proceeding, Mr. Lawrence Smith, indicated by mail to the Judge and to counsel for the parties that he did not plan to present any witnesses or documentary evidence on behalf of the Respondent during the course of this hearing, so we have proceeded accordingly.

Now today we have had the testimony of four witnesses on behalf of the Administra-

tor: Inspector Elliott; Manager Kaylor of the Schenectady Airport; Tower Chief Hesner of the Tower at the Schenectady Airport; and Supervisory Air Traffic Controller Klimchak, the Albany Traffic Controller.

These witnesses, and at least two of them, Manager Kaylor and Controller Hesner, were percipient witnesses, that

is eyewitnesses to what occurred on November 26th 1982, which you recall the Respondent, David S. Komjathy, was the pilot in command of a Cessna 150 aircraft, departed Schenectady Airport, Schenectady, New York under Visual Flight Rules at approximately 1754 Greenwich mean time. Shortly after takeoff the Respondent decided to return to Schenectady and contacted the Schenectady Tower requesting landing instructions. Due to adverse weather conditions at the time, the Respondent was advised to contact the

Albany Approach Control for a special VFR clearance. A few minutes thereafter, after contacting the Albany Approach Control, he was directed to depart the Schenectady control zone to the northeast. The Respondent acknowledged that instruction.

Several minutes later the Respondent's aircraft was observed flying over Runway 4 at Schenectady Airport, and shortly thereafter he landed on Runway 22 at Schenectady Airport, but he did not maintain contact with the Schenectady Tower during the time when he returned to Schenectady Airport prior to, during, or after the landing, and the Administrator, as a result of this incident, has charged him with violating four sections of the Federal Aviation Regulations.

It should be stated that the Respondent, prior to this case coming to hearing, has admitted all of the allegations of the

save the last section of said Order of Suspension specifying as to what particular section of the Federal Aviation Regulations he violated, he's admitted everything else. But even in view of that, upon my review of the evidence, coupled with the 12 documentary exhibits that the Administrator has introduced into the hearing record during the course of this proceeding here today, i would have to find, conclude, and hope that the Administrator, by a very substantial amount of evidence, both in a documentary sense as well as live testimony from the witness chair here, has proven, even though he didn't have to in view of the Respondent's admissions, the evidence is almost overwhelming, the Administrator has successfully proven every allegation as set

forth in his Order of Suspension of April 4th 1984.

I am not unmindful of the fact that when you have experienced people, individuals, in the realm of aviation as we have had testify here today, all four of the Administrator's witnesses, Inspector Elliott, Manager Kaylor, Traffic Control Chief Hesner, and Supervisory Air Traffic Controller Klimchak, all of these people have long, extensive backgrounds with concomitant experience in aviation, and I would have to deem them all to be experts in their particular aviation realms. And when you have a person like Traffic Control Chief Hesner who says he was definitely put in fear and apprehension because of the close proximity of the Respondent's aircraft and 5 Delta

_____ p.100 _____

Fox, the aircraft that Dr. Flanders was flying, and also Manager Kaylor who was

instructing a student at that time, who said he felt immeasurably better after he had landed in view of not only the weather closing in but what he ascertained could have been a hazardous situation posed by the Respondent's aircraft being in the area without the Respondent having any contact or clearance with the Schenectady Tower, then I would have to wholeheartedly concur with Inspector Elliott's opinion that the Respondent did not act, taking everything into consideration in this case, the Respondent did not act as a reasonably prudent pilot.

He was a non-instrument-rated pilot, the weather had become very bad after he took off and was getting progressively worse. You may recall the testimony of Manager Kaylor who said he definitely came down as quick as he could when he saw the weather deteriorating so rapidly. The Respondent really had no business at all in the air

because he was a non-instrument-rated pilot and the VFR weather had evaporated in the Schenectady area.

Ladies and gentlemen, based upon my review of all of the testimony and the documentary exhibits here, I would have to make the following specific findings of fact and conclusions of law:

1. The Respondent, David S. Komjathy, admits and it is found that he is now and at all times mentioned herein

the holder of Airman Certificate No. 71322174 with a private pilot rating.

2. The Respondent admits and it is found that on or about November 26, 1982 at approximately 1754 Greenwich mean time the Respondent was the pilot in command of a Cessna 150 aircraft, Identification No. N8526J, departing Schenectady Airport, Schenectady, New York under Visual Flight Rules.

3. The Respondent admits and it is found that shortly after takeoff the Respondent decided to return to Schenectady and contacted Schenectady Tower to request landing instructions. Due to adverse weather conditions, however, the Respondent was advised to contact Albany Approach Control for a special VFR clearance.

4. The Respondent admits and it is found that at approximately 1805 Greenwich mean time the Respondent contacted Albany Approach and was directed to depart the Schenectady control zone to the northeast. The Respondent acknowledged that instruction.

5. The respondent admits and it is found that at approximately 1809 Greenwich mean time Respondent was observed flying over Runway 4 at Schenectady Airport. The Respondent did not contact the Schenectady Tower at that time.

6. It is found that by reason of the foregoing the Respondent, David S. Komjathy, violated the following sections of the Federal Aviation regulations:

_____ p.102 _____

(a) Section 91.75B, in that the Respondent operated N8526J contrary to an Air Traffic Control instruction issued by the Albany Approach Control to depart the Schenectady control zone.

(b) Section 91.105D, in that the Respondent entered the traffic pattern and landed Respondent's aircraft at the Schenectady Airport which is within the Schenectady control zone under VFR with a reported ground visibility at the airport of less than three statute miles.

(c) Section 91.87C, in that the Respondent operated N8526J within the Schenectady Airport traffic area without establishing or maintaining two-way radio communications

between the aircraft and the Schenectady Tower.

(d) Section 91.9, in that by the facts described above, the Respondent operated his aircraft in a careless manner so as to endanger the life or property of another.

7. It is found that safety in air commerce or in air transportation in the public interest does require the affirmation of the Administrator's Order of Suspension dated April 4th 1984 in view of the violation of the following sections of the Federal Aviation Regulations:

(a) Section 91.75B.

(b) Section 91.105D.

(c) Section 91.87C.

(d) Section 91.9.

O R D E R

It is ordered: That the Administrator's Order of Suspension dated April 4th 1984 being the same hereby is affirmed.

This Order is issued by William E. Fowler, Jr., United States Administrative Law Judge.

SERVED: July 14, 1986
NTSB Order No. EA-2343

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of June, 1986

DONALD D. ENGEN, Administrator, Federal Aviation Administration,	)	
Complainant,	)	
v.	)	Docket: SE-6249
DAVID S. KOMJATHY,	)	
Respondent.	)	

OPINION AND ORDER

Respondent, through counsel, is appealing from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr. which affirmed the Administrator's amended order suspending respondent's airman certificate (with a private pilot

rating) for 180 days. 1/ The law judge found that on

1/ An excerpt from the hearing transcript containing the initial decision is attached.

November 26, 1982 respondent was pilot in command of an aircraft at Schenectady, New York, and violated the following provisions of the Federal Aviation Regulations (FAR).

(1) Section 91.75(b) by operating an aircraft contrary to an air traffic control instruction to depart the Schenectady Control Zone.

(2) Section 91.105(d) by entering the traffic pattern and landing at the Schenectady Airport, which is within the Schenectady Control Zone, under visual flight rules, with a reported ground visibility at the airport of less than three statute miles.

(3) Section 91.87(c) by operating an aircraft within the Schenectady Airport traffic area without establishing or maintaining two-way radio communications between the aircraft and the Schenectady Tower.

(4) Section 91.9 by operating an aircraft in a careless manner so as to endanger the life and property of another. 2/

2/ The regulations read in pertinent part as follows:

"§ 91.75 Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircarft [sic] contrary to an ATC instruction"

"§ 91.105 Basic VFR weather minimums.

(d) Except as provided in §91.107, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within a control zone--

(1) Unless ground visbility [sic] at that airport is at least 3 statute miles; or

2/ Cont.

(2) If ground visibility is not reported at that airport, unless flight visibility during landing or takeoff, or while operating in the traffic pattern, is at least 3 statute miles.

"§ 91.87 Operation at airports with operating control towers.

(c) Communication with other control towers. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower that is operated by any person other than the United States unless--

(1) If that aircraft's radio equipment so allows, two-way radio communications are maintained between the aircraft and the tower; or

(2) If that aircraft's radio equipment allows only reception from the tower, the pilot has the tower's frequency monitored.

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

On appeal, respondent does not challenge the law judge's findings of fact or

findings of regulatory violations. 3/ Nor does respondent challenge the Administrator's authority to promulgate or the procedures used to promulgate the regulations he was found to have violated. In his brief, respondent makes a number of arguments which are in one form or another variations on three basic contentions: (1) The Administrator lacks the statutory authority to take certificate action for violations of the FAR; (2) The Administrator does not have a valid regulation authorizing certificate action for violations of the FAR; and (3) The Administrator has violated the Administrative Procedure Act (APA) by failing to have a regulation which explains how the Administrator chooses between civil penalty and certificate action and by failing to have a regulation which sets forth the criteria governing civil penalties and certificate actions. The Administrator has filed a

reply opposing the appeal and requesting affirmance of the initial decision.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order and the initial decision.

3/ Respondent attended the hearing but did not present any evidence.

If upon investigation the Administrator determines that "safety in air commerce of air transportation and the public interest requires", he can under §609 of the Federal Aviation Act of 1958 order the suspension of an airman certificate. 49 U.S.C. §1429. This statute does not explicitly state that the Administrator may suspend a certificate for violations of the FAR; however, a prior

version of this section which contained similar langauge [sic] has been construed to authorize the suspension of an airman license for violations of safety regulations. 4/ In Wilson, the court rejected the argument that the then §609 which provided for the suspension of an airman certificate "if the interest of the public so requires" did not authorize a suspension for the violation of regulations.

After §609 was changed by the 1958 Act, a challenge to the power to suspend certificates for safety infractions was again rejected. Pangburn v. Civil Aeronautics Board, 331 F.2d 349 (1st Cir. 1962). Furthermore, the Court quoted the following explanation of new §609 by a key committee chairman reflecting Congress' desire to perpetuate the tradition of ordering a suspension or revocation for violations of safety rules:

"'This right of review by the Board is not intended to change existing relationships as announced by the courts, either with respect to the burden of proof in such cases, which would be borne by the agency, or with respect to conditions under which, or the purposes for which safety certificates may be suspended, or revoked ***. (104 Con. Rec. 16081, August 4, 1958, emphasis added.)" 5/

4/ Wilson v. Civil Aeronautics Board, 244 F.2d 733 (D.C. Cir. 1957).

5/ Pangburn at 355.

Respondent nevertheless argues that judicial decisions such as Wilson and Pangburn are based on a fundamental mistake of fact and law. As we understand respondent's position, these courts erred by considering and applying the language of the Act when in effect and instead these courts should have focused their analysis on the 1926 Act. In short, respondent states that the only enforcement mechanism under the 1926 Act was civil money penalties, and since a brief filed by the

Government in the Wilson case acknowledged that the safety regulatory provisions of the 1938 Act were largely an extension of the 1926 Act, respondent concludes that the 1938 Act were largely an extension of the 1926 Act, respondent concludes that the 1938 Act could not have authorized suspensions for regulatory transgressions. First, we cannot review alleged errors of the courts of appeals. Second, the Wilson decision analyzed the interrelationship between civil penalty authority and certificate action in the 1938 Act and in fact determined that the carryover of civil penalty enforcement from the 1926 Act was not a bar to the new suspension provision under the 1938 Act, as applied to regulatory violations. Third, the quotes from government's brief in Wilson relied on by respondent are limited to safety regulatory authority; these references do not address the scope of statutory enforcement

authority. Unlike the reasoned decision in Wilson, the isolated excerpts selected by respondent from a brief filed in that case do not address the meaning of the new statutory provision contained in the 1938 Act. 6/

6/ A brief, of course, does not define the law. We must accept Wilson for what it decided, not what was contained in the briefs in the case. Moreover, the only issue before the Court in Wilson and whether an airman certificate could be suspended as a deterrent sanction, and respondent has avoided quoting those portions of the brief which undoubtedly addressed that issue.

Respondent has not supported his theory that the express authority in the 1938 Act to suspend certificates was not intended to permit such suspensions for violations of safety regulations. In any event, the unmistakable expression of congressional intent quoted in Pangburn, supra, demonstrates that the 1958 Act, pursuant to

which the Administrator suspended respondent's certificate herein, endorsed the holding of judicial decisions such as Wilson, ratified the practice of suspending certificates for violations of safety regulations, and envisioned the continuation of this practice. _____

The preceding discussion demonstrates that the Administrator and his predecessors have had the statutory authority before and after the enactment of the APA to take certificate action for violations of the safety regulations and that the Congress was not only well aware of and ratified this enforcement regimen but also expressly sanctioned its continuation. Since the Administrator has the statutory power which has been exercised for decades to institute suspensions and revocations based on violations of the safety rules, the issuance of a regulation repeating that authority is not a prerequisite to the use

of the authority contained in the organic act. 7/

7/ Respondent does not claim that he was unaware of the fact that the Administrator takes certificate action for violations of the FARs, and the statutory standard for such action--safety in air commerce or air transportation and the public interest--clearly contemplates violations of safety rules set forth in the FAR.

Turning to the challenge to the administrator's method and practice for choosing the type of action to pursue, the Board in language that applies equally to this case has stated:

> "...the Board's jurisdiction concerning enforcement proceedings extends only to the question of whether safety and the public interest require affirmation of the Administrator's order. The selection of which cases to prosecute, and the manner in which they are to be prosecuted, are matters within the discretion of the Administrator, acting pursuant to his statutory authority." 8/

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied; and

2. The Administrator's order and the law judge's decision be and they hereby are affirmed.

3. The 180-day suspension of respondent's airman certificate shall commence 30 days after service of this order. 9/

GOLDMAN, Acting Chairman, BURNETT, LAUBER and NALL, Members of the Board, concurred in the above opinion and order.

8/ Administrator v. Greiner, 1 N.T.S.B. 874, 877 (1970).

9/ For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to §61.19 (f) FAR.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1444

DAVID S. KOMJATHY, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD, et al.,
RESPONDENTS

Petition for Review of an Order of the
National Transportation Safety Board

Filed November 13, 1987

Lawrence B. Smith was on the brief for Petitioner.

Peter J. Lynch and *Vicki S. Leemon*, Federal Aviation Administration, were on the brief for Respondents.

Before WALD, *Chief Judge*; ROBINSON and D.H. GINSBURG, *Circuit Judges*.

Opinion Per Curiam.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

PER CURIAM: By order dated April 4, 1984, the Administrator of the Federal Aviation Administration ("FAA") suspended appellant David S. Komjathy's airman certificate, which had a private pilot rating, for 180 days, based upon alleged violations of several provisions of the Federal Aviation Regulations ("FARs"). Pursuant to 49 App. U.S.C. § 1429(a) (1982), Komjathy appealed the order to the National Transportation Safety Board ("NTSB" or "Board"), appellee here. An administrative law judge ("ALJ") of the NTSB affirmed the order of suspension; when Komjathy appealed to the full Board, the latter affirmed the order of suspension and the decision of the ALJ. Komjathy filed a timely petition for review in this court.

In his petition for review, Komjathy emphasizes that he is raising "strictly legal issues" and that "the facts have no direct relevance [to those issues]." Petitioner's Brief at 5. Consequently, the only issues before the court are the legal challenges raised by Komjathy, notwithstanding the sparring between the parties as to the facts underlying the legal dispute. Having reviewed each of petitioner's legal challenges, we find them to be wholly without merit.

I.

We first address petitioner's standing to raise several of his challenges. Article III of the Constitution restricts this court's authority: we may consider cases only if the party invoking the court's authority shows that he or she has suffered injury, whether past or future, that the injury is traceable to the action of the defending party, and that a favorable ruling by the court is likely to remedy the harm. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

While Komjathy has standing to challenge the FAA's authority to suspend airman's certificates, since that was the sanction imposed on him, he cannot here raise his

claims against the agency's use of civil penalties as sanctions for violation of FARs, because he plainly cannot show that he has suffered injury, either actual or potential, from the agency's use of civil penalties. Similarly, he cannot, in the present suit, ask this court to review the propriety of the FAA's choosing between certificate suspension and a civil penalty as a sanction, because even a favorable ruling on that point—a holding that the FAA was barred from considering any alternative sanction to the certificate suspension imposed on Komjathy—plainly would not redress any injury to him. Consequently, we dismiss petitioner's challenges to the policies and regulations governing the use of civil penalties and the choice between that sanction and certificate suspension.

II.

As noted above, Komjathy has standing to challenge the FAA's suspension of airman certificates and we now turn to consider his claim in that regard. He charges that there is no statutory authority for the FAA's policy of suspending airman certificates as a sanction, and that the FAA failed to promulgate that policy through proper rulemaking procedures and to publish that policy either in the Federal Register or the Code of Federal Regulations. Those alleged agency failures, according to Komjathy, constitute violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553, 558, and the Due Process Clause of the Fifth Amendment. Petitioner's allegations lack merit and are easily refuted by examination of the statutory language and well-settled case law.

There is a clear statutory basis for the FAA's policy of suspending airman certificates as a sanction for violation of FARs. The Federal Aviation Act provides the Administrator of the FAA broad discretion to suspend airman certificates upon a determination that the safety and the public interest so require. 49 App. U.S.C. § 1429(a). It is settled that that authority may be used

for the purpose of suspending an airman certificate as a disciplinary sanction for violation of FARs. *See, e.g., Go Leasing, Inc. v. NTSB*, 800 F.2d 1514, 1519-21 (9th Cir. 1986); *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349, 354-56 (1st Cir. 1962).

The legislative history of the Federal Aviation Act, reviewed in *Pangburn*, 311 F.2d at 355, provides clear evidence of congressional intent to allow the continued practice of imposing certificate suspension as a disciplinary measure for deterrent purposes. As the Supreme Court has written with regard to a similar statutory scheme, Congress plainly intended in its broad grant to give the head of the agency, authority to employ the statutory sanction as in the agency chief's judgment best serves to deter violations. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973) (Packers and Stockyards Act). *See also Barnum v. NTSB*, 595 F.2d 869, 871-72 (D.C. Cir. 1979) (FAA Administrator has great discretion in carrying out the statutory provisions).

Petitioner's challenge to the regulation implementing § 1429(a), 14 C.F.R. § 13.19, has no more merit than his statutory claim. That regulation, insofar as it relates to the challenged policy of suspension of airman certificates for the protection of the public interest and the safety of air commerce, does no more than repeat, virtually verbatim, the statutory grant of authority in 49 App. U.S.C. § 1429(a) for the ordering of such suspensions.

The fact that the regulation merely reiterates the statutory language precludes any serious argument that the regulation affects the agency or holders of airman certificates in such a way as to require notice-and-comment procedures pursuant to 5 U.S.C. § 553. The regulation does not restrict the agency's statutory discretion in any way. *Cf. Telecommunications Research and Action Center v. Federal Communications Commission*, 800 F.2d

1181, 1186 (D.C. Cir. 1986) (notice-and-comment procedures required where agency statement, however labelled, has the effect of a binding norm). Nor could the reprinting of the statutory language in a regulation have affected Komjathy's rights and interests. *Cf. National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 950 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) (holding that agency instruction that substantially affects individuals' rights and interests cannot be promulgated without notice-and-comment procedures). This is therefore not a case where the court needs to make the sometimes difficult decision about whether a given rule, however designated by the agency, is substantive, thus requiring notice and comment pursuant to 5 U.S.C. § 553, or interpretative and therefore exempt from notice and comment requirements, *see* 5 U.S.C. § 553(b). *See Guardian Federal Savings and Loan Ass'n v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 665 (D.C. Cir. 1987). Issuance of § 13.19 plainly did not require notice-and-comment procedures.[1]

III.

Komjathy raises one further ground for challenging 14 C.F.R. § 13.19. He claims that the regulation is unconstitutionally vague. Section 13.19, like 49 App. U.S.C. § 1429(a), provides that a certificate may be suspended when air safety and the public interest so require. The "vagueness" of which Komjathy complains is nothing other than the broad discretion that Congress has chosen to bestow on the Administrator of the FAA. The regula-

[1] We note that, even if Komjathy were correct and the agency had to go through the formality and notice-and-comment procedures merely to repeat the statutory language, that formality was complied with. Komjathy does not dispute that notice and comment procedures were followed in the recodification of 14 C.F.R. in 1962, 27 Fed. Reg. 5694 (1962). *See Go Leasing, Inc. v. NTSB*, 800 F.2d 1514, 1522 (9th Cir. 1986).

tions that actually proscribe the conduct for which Komjathy's airman certificate was suspended are *not* challenged, either for vagueness or for any other reason, in this action. Komjathy thus does not allege that he did not have fair warning of what conduct was proscribed; he alleges, at most, that he was not duly warned of what penalty the Administrator would choose, in his discretion, to impose for Komjathy's engaging in proscribed activity. *Cf. United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963) (a statute is only unconstitutionally vague if one could not reasonably understand that contemplated conduct was proscribed). Because Komjathy's argument goes to the broad discretion that Congress has bestowed on the agency, rather than the vagueness of the rules regarding proscribed conduct, we find his claim that § 13.19 is unconstitutionally vague to be wholly without merit.

IV.

Finally, petitioner argues that the NTSB lacks statutory authority to suspend a pilot's license for violation of federal aviation regulations. This claim flies in the face of plain statutory language granting the NTSB authority to "review on appeal the suspension . . . of any operating license . . . under [*inter alia*, 49 App. U.S.C. § 1429]." 49 App. U.S.C. § 1903(a)(9) (Supp. III 1985). The NTSB has authority to amend, modify, or reverse the Administrator's order. 49 App. U.S.C. § 1429(a). We find Komjathy's challenge to the NTSB's authority in this regard to be utterly without basis.

V.

In sum, we hold that Komjathy has failed to demonstrate any basis for this court's overturning the decision of respondent NTSB. Consequently, we deny the petition for review.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-1444 September Term, 1987

David S. Komjathy Filed Feb 1 1988

v.

National Transportation Safety Board, et al.

BEFORE: WALD, Chief Judge; ROBINSON and D.H. GINSBURG, Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CIVIL AERONAUTICS ACT OF 1938,
ch. 601, § 609, 52 Stat. 973, 1011

Reads in part:

The Authority [CAA Administrator] may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may re-examine any airman, and after investigation, and upon notice and hearing, may alter, amend, modify, or [the Board may] suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or [the Board] may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to

issue the holder of such certificate a like certificate.

* * * * *

5 U.S.C. § 551(4) (1982)

For the purpose of this subchapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

* * * *

* * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations,

costs, or accounting, or practices bearing on any of the foregoing.

* * *

5 U.S.C. § 552(a)(1) (1982)

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms

thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

5 U.S.C. § 553 (1982)

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved --

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public

property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or

rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency

hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 558 (1982)

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

* * * *

5 U.S.C. § 706 (1982)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. app. § 1429(a) (1982)

Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation [Administrator], he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness

certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation [Administrator] shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation [Administrator] for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation [Administrator] under this section may appeal the Secretary of Transportation's [Administrator's] order to the

National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's [Administrator's] order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's [Administrator's] order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation [Administrator]. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's [Administrator's] order unless the Secretary of Transportation [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his

order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation [Administrator]. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this Appendix, and the Secretary of Transportation [Administrator] shall be made a party to such proceedings.

* * * *

49 U.S.C. app. § 1471 (1982)

Civil penalties; notice and hearing; compromise; liens

(a)(1) Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter * * * or any rule, regulation, or order issued there-

under, * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation, * * * If such violation is a continuing one, each day of such violation shall constitute a separate offense. * * *

(2) Any civil penalty may be compromised by the Secretary of Transportation [Administrator] in the case of violations of subchapters III, V, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, * * *

49 U.S.C. app. § 1473(b)(1) (1982)

Venue and prosecution of offenses; procedures in respect of civil and aircraft piracy penalties

(b) Procedure in respect of civil penalties

(1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty

and, in case the penalty is a lien, by proceedings in rem against the aircraft, or by either method alone. Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that with respect to proceedings involving penalties other than those assessed by the Board, either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. The fact that in a libel in rem the seizure is made at a place not upon the high seas or navigable waters of the United States shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits in rem in admiralty.

14 C.F.R. § 13.15 (1987)

Civil penalties: Federal Aviation Act of 1958

(a) Under section 901 of the Federal Aviation Act of 1958 (49 U.S.C. 1471), a person who violates any provision of Title III, V, VI, or XII of that Act, or any regulation or order issued under one of those titles, is subject to a civil penalty of not more than $1,000 for each violation.

(b) The Administrator may compromise any civil penalty. If a civil penalty is contemplated and it is considered advisable to compromise it, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Aeronautical Center Counsel (as to matters under Title V of the FA Act), of the Regional Counsel concerned sends a letter to the person charged with the violation, advising him of the charges against him and the law, regulation, or or [sic] order that he is charged with

violating, and offering to compromise the penalty. The person charged with the violation may present, to the official who signed the letter, any oral or written material or information in answer to the charges, explaining, mitigating, or denying the violation, or showing extenuating circumstances. Material or information so presented is considered in making the final determination as to probable liability for a civil penalty, or the amount for which it will be compromised.

(c) If the person charged with the violation offers to compromise for a specific amount, he shall send a certified check or money order for that amount, payable to the Federal Aviation Administration. The Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Aeronautical Center Counsel (as to matters under Title V of the FA Act), or

the Regional Counsel concerned may accept or refuse it.

(d) If the compromise amount is accepted, the person charged with the violation is notified, by letter, that the acceptance is full settlement of the civil penalty for the violation.

(e) If a compromise settlement of the civil penalty cannot be made, the Administrator may instigate proceedings in a United States District Court, under section 903 of the FA Act (49 U.S.C. 1473), to collect the penalty.

14 C.F.R. § 13.19 (1987)

Certificate action.

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the Administrator may reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air

agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or

regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Regional Counsel concerned. If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration

has refused or failed to submit AC Form 8050-73, as required by § 47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief Counsel, the Assistant Chief Counsel for

Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to --

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in accordance with the notice of proposed certificate action so that the certificate holder may appeal to the National Transportation Safety Board, if

the charges concerning a matter under Title VI of the FA Act;

(4) Request an opportunity to be heard in an informal conference with the FAA counsel; or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act.

Except as provided in § 13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the FAA counsel and the charges concern a matter under Title V of the FA Act, the holder may after that conference also request a formal hearing in writing with a postmark of not later than 10 days after

the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Transportation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in air commerce

requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.

14 C.F.R. § 408.23 (1960)

Civil penalties

Under section 901 of the Act, any person who violates any provision of Titles III, V, VI, or XII of the Act, or any rule, regulation, or order issued thereunder, shall be subject to a civil penalty not to exceed $1,000 for each such violation.[1] Such civil penalty may be compromised by

1 the same is true for violations of Title VII, but the Civil Aeronautics Board has cognizance of those violations.

the Administrator. In the event imposition of a civil penalty is contemplated by the Administrator, and it is considered advisable to compromise such penalty, a Regional Attorney or the General Counsel of the Agency will send a letter to the violator advising as to the charges against him, stating what laws, rules, regulations, or orders have been violated, and affording an opportunity to compromise the civil penalty. The violator may submit to the official signing the letter, either orally or in writing, any material or information in answer to the charges, explaining, mitigating or denying the occurrence of the violation, or showing extenuating circumstances. Any material or information thus submitted will be considered in making the final determination as to probable existence of liability for a civil penalty, or the amount for which it will be compromised. If an offer is tendered to

compromise the penalty for a specific amount, a certified check or money order in that amount, made payable to the Federal Aviation Agency, should be attached. The General Counsel of the Agency, or the Regional Attorney handling the case, will accept or refuse the offer of compromise. When scheduled and irregular air carriers and their personnel, air taxi operators, commercial operators, and certificated repair stations are involved, only the General Counsel of the Agency will accept or refuse the offer of compromise. If the offer of compromise is accepted, the violator will be notified by letter of its acceptance and that such acceptance constitutes full settlement of any civil penalties incurred by the violator. If a compromise settlement of the civil penalty cannot be effected, the Agency will, in an appropriate case, instigate proceedings in the United States District Court, pursuant

to section 903 of the Act, for the purpose of collecting the civil penalty due.

14 C.F.R. § 408.25 (1960)

Certificate action.

(a) Under section 609 of the Act, the Administrator may reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection, reexamination, or any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires such action, he may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air naviga-

tion facilities certificate, or air agency certificate. Prior to issuing such an order, the Agency's General Counsel or Regional Attorney will advise the certificate holder as to the charges or other reasons relied upon by the Administrator for the proposed action and except in case of emergency, provide him an opportunity to answer any charges to be heard as to why such certificate should not be amended, modified, suspended, or revoked. At his option, the holder may answer the charges in writing, or he or his representative may make a personal presentation before an appropriate representative of the Administrator at a designated office of the Agency. After due consideration thereof, the holder will be informed of the decision of the Agency by the General Counsel or Regional Attorney.

(b) Any person whose certificate is affected by an order issued under this

section may appeal to the Civil Aeronautics Board. The filing of an appeal with the Board stays the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order.

EXHIBIT A

Compliance and Enforcement Program, FAA Order 2150.3 (1980) (Reprinted Oct. 1983) [emphasis added; FAR references--all 14 C.F.R.--added to contrast with the fact no FAR speaks to certificate penalties but there is a rule for everything else].

203. ENFORCEMENT PROGRAM. The objectives of the enforcement program as set forth in Order 1000.9C, Enforcement Policy, are achieved through surveillance and detection, investigation, and enforcement processing.

. . . .

_____ p.12 _____

. . . .

c. Enforcement Processing. When violations occur, firm action must be taken. A vigorous enforcement policy is necessary to achieve compliance with the regulations and we must forcefully respond to violations. Firmness should be balanced with fairness.

(1) Policy. Compliance with the regulations is promoted through both administr-

ative and formal legal actions. Administrative actions (warning letters or letters of correction [**FAR § 13.11**]) are utilized to check potentially unsafe practices in situations where formal actions are unnecessary or inappropriate. Formal legal actions are undertaken to:

(a) Enjoin conduct, before the act, which would violate the regulation (e.g., cease and desist orders [**FAR § 13.20**], injunctions [**FAR § 13.25**], aircraft seizures [**FAR § 13.17**]);

(b) Impose punitive sanctions, after the act, to deter violations (e.g., certificate actions [no FAR for such sanctions], civil penalties [**FAR § 13.15**]);

(c) Achieve remedial purposes (e.g., certificate suspension pending demonstration of qualifications; revocation for lack of certificate qualifications [**FAR § 13.19**]).

(2) Judgement in Selecting Appropriate Action. It is difficult, solely by order, to establish guidelines which will correctly categorize all regulatory infractions so as to pin point the appropriate enforcement action. The ultimate decision must be the product of judgement and experience applied to the facts and circumstances of the individual case. Inspectors and field office chiefs must continue to exercise good judgement in handling first offense violations which meet the criteria for

administrative action and can be so handled with dispatch. If, however, the violation does not fit that criteria or there is deceit or incompetence involved, take strong action. Use the maximum sanctions appropriate. If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate action. Enforcement

and investigative personnel can expect that their diligent efforts will be given full support at all levels of the FAA.

(3) National Uniformity. Each region must make every effort to achieve uniformity of enforcement action. **Similar violations under similar circumstances should result in the same type of enforcement action and sanction**. . . .

204. ADMINISTRATIVE ACTION . . .

205. DETERMINING THE TYPE OF LEGAL ENFORCEMENT ACTION. It is the inspector's responsibility to initially recommend the appropriate enforcement action. All involved elements of the FAA are then responsible for evaluating the seriousness of a violation, defining its impact on safety, **and judging the necessary action to obtain compliance**. It is the intent of the following guidelines to assure greater national uniformity in enforcement actions.

a. Civil penalty.

(1) Civil penalty action is normally used as the sanction in cases where the violator does not hold any current certificate, in cases where the violator holds a certificate but no question of qualification is involved, or where the facts or circumstances are too serious to handle by administrative type enforcement action. Civil penalties may also be used in lieu of

certificate action where suspension is not necessary to obtain immediate corrective action. For example, where a major air carrier is involved in a maintenance violation and has taken satisfactory corrective action, a substantial civil penalty will serve as an appropriate deterrent without disrupting essential air service to the public. Civil penalties also may be initiated in any case where normally a suspension would be manifestly unfair or create an undue hardship and is not required for aviation

safety. However, when there is a serious ongoing safety violation involved, and immediate corrective action cannot be obtained, certificate action should be considered not withstanding hardship to the certificate holder or disruption of public service.

(2) Civil penalty action will not normally be used as an additional sanction to certificate action. It should not be used as a substitute for certificate or restraining action when competence, attitude, or other circumstances are such that the same or similar violation is likely to occur.

b. Certificate action - suspension.

(1) Suspension action should be considered in all cases where safety requires it. For example, it should be utilized against an aircraft component manufacturer involved in serious quality control violations, whose product must be prevented from entering into service until adequate corrective actions are completed.

(2) It should be used in all cases where technical proficiency or qualification warrants, as in the case of an unqualified mechanic.

(3) Suspension action is warranted in situations where a certificate holder resists reexamination or reinspection under Section 609 of the Federal Aviation Act, or the reexamination or reinspection is not satisfactorily accomplished within a reasonable length of time (see Chapter 8).

(4) Suspension may be used for punitive purposes where the nature of the violation warrants it, except in cases where over six months have elapsed since the date of alleged violation. (See 49 CFR 821.33, NTSB Rules of Practice). The withdrawal of the privileges of certificate is a natural, equitable, and just consequence of the abuse of such privileges.

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